Supreme Court, U. S.
FILED
MAY 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1648

AMERICAN CIVIL LIBERTIES UNION,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRUCE J. ENNIS
JOEL M. GORA
CHARLES S. SIMS
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

MICHAEL BOTEIN
Communications Media Center
57 Worth Street
New York, New York 10013

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

OPINIONS BELOW..... 2

JURISDICTION..... 2

QUESTIONS PRESENTED..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 4

STATEMENT OF THE CASE..... 4

REASONS FOR GRANTING THE WRIT..... 11

1. The Jurisdictional Question... 11
2. The Constitutional Issues..... 13

CONCLUSION..... 28

TABLE OF AUTHORITIES

Cases:

American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975).....11

Associated Press v. United States, 326 U.S. 1 (1945).....27

Brookhaven Cable TV, Inc. v. Kelly, Nos. 77-6156 and 77-6157 (2d Cir.), decided March 29, 1978..... 11,12

Cohen v. California, 403 U.S. 15(1971).15

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973)..... passim

Cox v. New Hampshire, 312 U.S. 569 (1941).....15

First National Bank of Boston v. Bellotti, 46 U.S.L.W. 4371 (1978)..14,26

Kovacs v. Cooper, 336 U.S. 77(1949)...15

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).....7,14

New York Times v. Sullivan, 376 U.S. 254 (1964).....15

Police Department of Chicago v. Mosley 408 U.S. 92 (1972).....26

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).....passim

Cases Continued

Stark County Communications, Inc., 38 FCC 2d 1147 (1972).....6

United States v. Midwest Video Corp., 406 U.S. 649 (1972).....passim

United States v. Southwestern Cable Co. 392 U.S. 157 (1968).....11,19,22

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).....15

Whitney v. California, 277 U.S. 357 (1927).....15

Wooley v. Maynard, 435 U.S. 705 (1977).....15

Administrative decisions:

Cable Television Report and Order, 36 FCC 2d 143 (1972).....6,16

Other citations:

Constitutional provisions:

Amendment I..... 5,9,10

Miscellaneous:

Tribe, American Constitutional Law 17,18

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. _____

AMERICAN CIVIL LIBERTIES UNION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents

AMERICAN BROADCASTING COMPANIES,
INC., et al,
Intervenors

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The American Civil Liberties Union ("ACLU") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, setting aside as beyond its jurisdiction the Federal Communications Commission's ("Commission's") Report and Order in Docket No. 20508, 59 FCC 2d 294, reconsideration denied, 62 FCC 2d 399 ("1976 Report").

OPINIONS BELOW*

The opinion of the Court of Appeals (App. A) is reported at 571 F.2d 1025 (8th Cir. 1978). The Commission's 1976 Report (App. B) and order denying reconsideration of the 1976 Report (App.C) are reported at 59 FCC 2d 294 and 62 FCC 2d 399.

JURISDICTION

The judgment and opinion of the United States Court of Appeals was entered on February 21, 1978. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether the Federal Communications Commission has jurisdiction to issue regulations designed to compel cable television operators

---

*/ Petitioner ACLU relies on and incorporates by reference the Petitioner's Appendix in a companion case, Federal Communications Commission v. Midwest Video Corp., No. 77-1575. That Appendix includes each of the opinions required by Supreme Court Rule 23 (1).

to increase technological capacity of cable systems, and to guarantee third-party (public) access to cable channels and facilities.

Whether the Federal Communications Commission's jurisdiction to issue regulations designed to compel cable television operators to increase technological capacity of cable systems and to guarantee third-party access to cable channels and facilities is consistent with the First Amendment when that power is exercised to increase the diversity of information and communication available to viewers.

Whether the Federal Communications Commission's 1976 Report on Cable Television Channel Capacity and Access Channel Requirements, insofar as it retreated irrationally and without justification from the channel capacity and access requirements of the 1972 Report, should be set aside as arbitrary, capricious, and contrary to constitutional right.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law... abridging the freedom of speech, or of the press....

The relevant provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 et seq., are set forth in App. E. The relevant rules and regulations of the Federal Communications Commission are 47 CFR § 76.251 (1972 ed.), set forth in App. F, and 47 CFR §§ 76.254 and 76.256 (1977 ed.), set forth in App. B, pp. 169-175.

STATEMENT OF THE CASE

This case proceeded in the Court of Appeals on the basis of two petitions, one by Midwest Video Corporation and one by the American Civil Liberties Union, for review of the Federal Communication Commission's Report and Order in Docket No. 20508 ("1976 Report"), imposing mandatory access and increased channel capacity requirements

upon cable television operators having 3500 or more subscribers.[1/]

Midwest Video Corporation, a cable operator subject to the new regulations, argued that the regulations were beyond the jurisdiction of the Commission and violative of the free speech clause of the First Amendment. Midwest had raised nearly identical arguments against a 1969 Commission requirement that cable operators originate some programing and have available facilities for local production and presentation of programs, arguments rejected by the Court in United States v. Midwest Video Corp., 406 U.S. 649 (1972) ("Midwest Video I").

Petitioner here, the American Civil Liberties Union, sought review of the 1976 Report on the ground that the access regulations lacked a rational basis, but only to the extent that the Commission retreated in the 1976 Report from earlier regulations, issued in 1972, which required all existing systems to supply a public access channel, an education access channel, a local government channel, and a leased access channel,

---

1/ App. B.

by March 31, 1977.[2/] The ACLU also argued that the Commission's retreat from the 1972 rules was arbitrary, capricious, contrary to constitutional right, or otherwise not in accordance with law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706 (1970) insofar as the Commission's revised access rules worked against the Commission's longstanding objectives of "increasing the number of outlets for self-expression and augmenting the diversity of programs and types of services available to the public."[3/] However, although it believed that the Commission had not fulfilled its mandate to promote those public objectives, the ACLU joined the Commission in rejecting Midwest's jurisdictional argument, reasoning that the basis for regulation of cable operators "for

---

2/ See Cable Television Report and Order 36 FCC 2d 143, 243-44 (1972) ("1972 Report") and App. F. Shortly thereafter, the Commission began granting waivers of the 1972 Report requirements on ad hoc basis, see Notice of Proposed Rulemaking, 53 FCC 2d 782 (1975), usually by granting permission to operate just one "conglomerate" channel for the "dedicated uses". E.g., Stark County Communications, Inc., 38 FCC 2d 1147 (1972).

3/ App. B, pp. 102-103. See also Midwest Video I, supra, 406 U.S. at 667-68.

the purpose of promoting the objectives for which the Commission had been assigned over broadcasting" was conclusively settled by Midwest Video I, supra, 406 U.S. at 667. And without contending that the regulations of the 1976 Report were the only rules that would have passed muster under the First Amendment, or indeed without necessarily supporting each specific provision of the Commission's regulations, the ACLU argued that the First Amendment did not disable the Commission from achieving "long-established, regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." Midwest Video I, supra, 406 U.S. at 667-68.

The Court of Appeals set aside the 1976 Report as beyond the Commission's jurisdiction. The majority[4/] strongly disagreed with the Commission's resolution of the

---

4/ Judge Webster concurred in the judgment. App. A, p. 91. The opinion was authored by Judge Markey, of the Court of Customs and Patent Appeals, sitting by designation, and joined by Judge Stephenson.

policy questions at issue.[5/] The court held that the Commission had failed to show a sufficient nexus between the access rules and its regulation of broadcast television. It thereby disregarded this Court's judgment in Midwest Video I that the goals of increased outlets for community self-expression and increased objects of public choice are within the Commission's mandate for the regulation of television, and that the Commission may regulate cable operators as well as broadcasters in furtherance of those goals so long as it has "reasonably determined" that its regulations will further those

---

5/ Compare Chief Justice Burger's concurring opinion in Midwest Video I, upholding the Commission's jurisdiction to require cable operators to originate programming:

> [T]he scope of our review is limited and does not permit me to resolve this issue as perhaps I would were I a member of the Federal Communications Commission. That I might take a different position as a member of the Commission gives me no license to do so here. 406 at 676.

goals, 406 U.S. at 667-68.[6/]

The Court made two further rulings on the assumption (which it had rejected) that the 1976 Report was within the Commission's jurisdiction. First, it ruled that, if it had been required to reach the First Amendment question raised by Midwest, it would have held the Commission's access rules constitutionally impermissible on the authority of Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).[7/] And, substituting its

---

6/ In his pivotal concurrence in Midwest Video I upholding the Commission's power to require program origination by cable operators to further the goals of diversity and increased choice, Chief Justice Burger observed that "Congress has created its instrumentality to regulate broadcasting, and has given it pervasive powers, and the Commission has generations of experience and "feel" for the problem. I therefore conclude that until Congress acts, the Commission should be allowed wide latitude...." Midwest Video I, supra, 406 U.S. at 676.

7/ App. A, pp. 72-74. The Eighth Circuit apparently did not decide whether the increased channel capacity requirement, alone, would have violated the First Amendment. However, if cable systems are "entitled

(continued on p. 10)

own judgment for the Commission's as to the wisdom or necessity of the rules under review, the Court indicated that even if the Commission did have jurisdiction to promulgate the increased capacity and access rules, the 1976 Report would probably have been overturned as "reflective of agency action arbitrary and capricious."[8/]

---

to the same First Amendment rights as other private media, such as newspapers", App. A, p. 72, it would seem that imposition of any requirements by federal or by local authorities would be forbidden. The decision below, if left standing, would apparently bar local imposition of access and capacity regulations and would call into serious question local licensing provisions generally, including the wide-spread practice of granting cable operators exclusive franchises.

8/ App. A, p. 91

REASONS FOR GRANTING THE WRIT

A. The Jurisdictional Question

This Court should decide whether the Commission has jurisdiction to issue regulations designed to increase cable channel capacity and to guarantee part of that capacity for public access in the interests of increased diversity. The Eighth Circuit's resolution of that question is patently in error under the reasoning and holding of previous decisions upholding Commission jurisdiction over cable television operation, United States v. Midwest Video Corp., 406 U.S. 69 (1972), and United States v. Southwestern Cable Co., 392 U.S. 157 (1968). It is also directly contrary to two recent decisions in the Courts of Appeals, American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975), and Brookhaven Cable TV, Inc. v. Kelly, ___F.2d ___, Nos. 77-6156, 77-6157 (2d Cir. March 29, 1978).[9/]

9/ American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975), upheld the
(continued on p. 12)

The Commission has sought, and intervenor National Black Media Coalition ("NBMC") intends to seek, certiorari to review the decision below. The Commission, of course, has a direct and vital interest in the jurisdictional question. Petitioner ACLU is confident that the Commission and the NBMC will fully and ably present to the Court the reasons why the Eighth Circuit's jurisdictional holding should be reviewed. Accordingly, Petitioner relies on those presentations.

1972 Report's access rules against an argument that the Commission was required to go further and treat cable operators as common carriers in the manner provided by Subchapter II of the Communications Act of 1934, 47 U.S.C. §§ 201-222. The Ninth Circuit had no doubts, however, that the Commission had ample jurisdiction to impose either the relatively relaxed 1972 Report access rules, or, indeed, full common carrier status if the Commission saw fit to do so. Id., 523 F.2d at 1350-1351. In Brookhaven Cable TV, Inc. v. Kelly, the Second Circuit held that regulation of special pay cable programming was preempted by the FCC. Brookhaven followed Midwest Video I in upholding FCC jurisdiction over cable TV so long as that regulation furthers "a goal which [the Commission] is entitled to pursue in the broadcast area." Slip. op. at 5.

B. The Constitutional Issues

The ACLU is primarily concerned with that portion of the decision below which held that the First Amendment is an inflexible bar to any imposition by Congress or by the Commission of increased capacity and access requirements. The issue is of overriding national importance: the fundamental structure of television communication for millions of Americans will be determined by its resolution. Only this Court can determine whether the Commission has properly weighed the competing considerations relevant under the First Amendment. 10/

At the heart of this case, should the

10/ The Court has been careful to exercise its responsibility as a national tribunal to decide the critical cases that have structured a national electronic communications system consistent with the First Amendment's prohibition of abridgement of freedom of speech and the First Amendment's protection of editorial diversity, independence, and responsibility. See United States v. Midwest Video, supra (FCC has jurisdiction over cablecasting); Columbia Broadcasting Systems v. Democratic National Committee, 415 U.S. 394 (1974) (broadcaster discretion to reject advertisements); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) (fairness doctrine); National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (requirement of licensee independence).

Court reverse on the jurisdictional question, is the problem of where cable television fits into the First Amendment system of freedom of expression. The majority below stated that "care and concern [for First Amendment rights] is remarkably absent from the 1976 Report." App. A, p. 66. To the contrary, although petitioners have urged that the Commission's retreat from the broader 1972 channel capacity and access rules was arbitrary and capricious, petitoners believe that the Commission's general approach to channel capacity and access rules represents a sensitive balance of the following five competing First Amendment interests and principles implicated by the medium of cable television:

1. The interest of a free press in minimizing the dangers of governmental control or governmental editorial intervention. See, e.g., Miami Herald Publishing Co. v. Tornillo, supra; CBS v. DNC, supra.

2. The interest of the public in receiving the widest variety and diveristy of communications. See, e.g., First National Bank of Boston v. Bellotti, 46 U.S.L.W. 4371 (April 26, 1978); Red Lion Broadcasting Co. v.

FCC, 395 U.S. 367 (1969); New York Times v. Sullivan, 376 U.S. 254 (1964).

3. The interest in furthering self-expression. See, e.g., Cohen v. California, 403 U.S. 15 (1971); Whitney v. California, 274 U.S. 357, 375 (1927)(Brandeis, J., concurring).

4. The principle that a person cannot be forced to say what he does not wish to say. See, e.g., Wooley v. Maynard, 430 U.S. 705(1977); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

5. The principle that the government can impose content-neutral time, place, and manner regulations to further important governmental interests not aimed at suppressing speech so long as the flow of information and ideas is not unduly constricted. See, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949); Cox v. New Hampshire, 312 U.S. 569 (1941).

Without analysis, the Court of Appeals held that cable operators are the exact equivalent, in First Amendment terms, of

newspaper owners, and are thus not subject to regulation, because the factor that has justified regulation of broadcasters - scarce spectrum resources - is assertedly not applicable to cable TV. 11/ But the Court failed to consider whether, based on factors relevant to cable TV, but not to newspaper publishing, the Commission might legitimately have concluded, in its expertise and discretion, that the First Amendment interests and principles set forth do not apply to cable television in precisely the same manner as they apply to newspapers, and that the differences between cable and newspapers justify, under the First Amendment, minimal, non-intrusive regulations designed to increase third-party diversity and choice with-

---

11/ Although there is no theoretical limit on the number of cables that can be laid in any locality, there are very substantial practical limits. Cable operators have generally demanded, and received, exclusive franchises from local or state regulatory authorities. Accordingly, even if cable television channels are not "scarce" in precisely the same way as are broadcast frequencies, cable television may still be "scarce" for purposes of First Amendment analysis.

out subjecting cable operators to governmental intervention or pressure. 12/

12/ In a perceptive summary of the competing considerations at issue here, Professor Lawrence Tribe has observed:

> [the] decision to vindicate rights of access with respect to the electronic media but not the print media may be seen as simultaneously realizing two competing constitutional values: "access in a highly concentrated press and minimal governmental intervention." By regulating access in the electronic media exclusively, one achieves significant assurance that information not disseminated by the regulated (electronic) sector will be published by the unregulated (print) sector; and the competition provided by such publication should in turn help to offset any indirect tendency of access regulation to induce narrow or timid coverage within the regulated (electronic) sector....
>
> Since each new medium tends to be widely perceived as "a law unto itself," the danger of escalating from a tolerable to an intolerable level of regulation may be minimized by initially focusing regulatory efforts on new technologies. If it is correct that "[a]ccess regulation in the print media would have immediately signified a pronounced break with traditional first amendment theory," with an attendant transformation in the boundaries of the legally thinkable and a corresponding increase in pressure to regulate still more deeply, then perhaps

Differences in the characteristics of media may justify differences in the First Amendment standards applied to them. Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 386; Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973)(hereinafter "CBS v. DNC".)

As the Commission properly recognized, cable does not share all the characteristics of broadcasting; accordingly, different First Amendment analysis may be warranted. 13/

[Footnote 12/continued]

> the initial selection of the electronic media as the regulated sector illustrates a way of exploiting new technology to permit regulatory experimentation while maintaining vital links with constitutional tradition.

Lawrence Tribe, American Constitutional Law (1978) at 699-700(footnotes omitted).

13/ For example, the Commission has ruled that the fairness doctrine does not apply to cable operators to the extent that they are passive transmitters.

On the other hand, at least three characteristics of cable television, ignored by the majority below, suggest that the First Amendment cannot automatically be applied as if cable were the technological equivalent of newspapers.

First, cable television relies on broadcast signals. 14/ As the decisions in Midwest Video and Southwestern Cable indicate, cable television's operation greatly affects the broadcast media over which the Commission has extensive, constitutionally permissible power. Indeed, the crucial interdependence and interrelationship between broadcasting and cable television was apparently a major factor in the Court's rejection of Midwest's argument that, because of the First Amendment's application to all nonscarce media, the 1969 program origination rules were beyond the Commission's jurisdiction. See generally Midwest Video I, supra,and Brief therein for respondent Midwest Video Corporation.

14/ See Midwest Video I, supra, 406 U.S. at 662, nn. 21-22.

Second, in contrast to newspaper publishers, cable operators are by the very nature of the medium unable to operate freely, at will, without public sufferance, licensing and assistance. Publishers can simply print and distribute; cable operators must enlist governmental authority to gain access to public rights of way, to dig up streets, to lay cable, and to secure the local monopolies, enjoyed by nearly all cable operators, that make cable operation financially possible or attractive. Neither historically, nor practically, can cable operators exist completely independent of government.

To the extent that cable operators function as cablecasters, or "speakers", the First Amendment prohibits governmental abridgement of their free speech rights, and of the correlative right "of the public to receive suitable access to social, esthetic, moral, and other ideas and experiences," Red Lion, supra at 390. But the extensive governmental assistance cable television operation requires is not guaranteed by the First Amendment. Nor does the First Amendment guarantee that such assistance will be provided on demand, and

free of accompanying regulation. 15/ The Court has observed that the government could constitutionally impose access requirements on broadcast frequencies, and the words used by the Court are equally applicable to cable television: "rather than confer [cable operation] monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government surely could have decreed that each [cable system] should be shared by those who wish to use it, each being assigned a portion of the ... day or the ... week." Red Lion, supra, at 390.

15/ "As Mr. Chief Justice (then Judge) Burger has stated in a related context:

> The Petitioners [telephone companies providing CATV channel distribution facilities] have, by choice, inserted themselves as links in this indivisible stream and have become an integral part of interstate broadcast transmission. They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission."

Midwest Video I, supra, 406 U.S. at 662 n. 21 (citation omitted; emphasis added).

Third, as the Commission 16/ and the Court 17/ have recognized, cable television is technologically a "hybrid," sharing significant characteristics of both broadcasters and common carriers. Indeed, cable television is similar in important respects to electronic broadcast media, to print media, and to common carriers. The Commission's regulations mandating increased capacity to twenty channels and guaranteeing one (1976 Report) or four (1972 Report) channels of that capacity for public access on a first-come first-served basis are founded on the common carrier characteristics and capabilities of cable technology. This suggests a different and more accurate analogy for the purpose of First Amendment analysis--the comparison of cable systems with telephone systems. 18/

16/ Cable Television Report and Order, 36 FCC 2d 143 (1972).

17/ United States v. Southwestern Cable Co., 392 U.S. 157, 172-178 (1968).

18/ The similarities are suggestive, and striking. First, both cable and telephone systems rely on cables laid, or wires strung, from disparate points to a central transmitting or switching facility. Second, with each, although there is no theoretical limit to the number of competing systems in any

The regulation of telephonic and telegraphic cables as common carriers, with responsibility indifferently to carry messages, has never been held to violate the First Amendment. AT&T is free to carry its own messages on telephone lines; but it is also required, in the public interest and consistent with the First Amendment, to carry messages of the public on a first-come, first-served basis.

These factors were overlooked or ignored by the court below. The majority held that cable television is not a public forum, App. A, p. 68, and accordingly ruled that public access was not constitutionally

---

[Footnote 18/ continued]

locality, economic constraints dictate monopolistic operation. Third, although the majority of telephone calls are still placed by individual callers to selected, active recipients, the advent of recorded notices and public service messages has made it increasingly clear that the telephone has no more inherent audience discrimination than cable television has. Finally, commercial development of the picturephone and two-way cable television capabilities has rendered the uses and potentialities of cable television and the telephone increasingly indistinguishable.

required. But deciding that cable television is not a public forum does not answer the very different question of whether public access is constitutionally permissable. As the Court has indicated, access may be permissable without being required. Red Lion, supra, 395 at 390.

In CBS v. DNC, for example, the Court did not appear to doubt that the Commission could, consistent with the First Amendment, "devise some kind of limited access that is both practicable and desirable," although it held that political parties had no First Amendment right of enforced access to broadcast time. CBS v. DNC, supra, 412 U.S. at 131. The Court's citation of the Commission's proposed rule on cable access did not suggest any First Amendment bar. Id.

* * *

In CBS v. DNC, the Court warned against freezing the dynamic process of designing "reasonable regulation compatible with the First Amendment rights of the public and the licensees." 19/ That warning is especially

---

19/ CBS v. DNC, supra, 412 U.S. at 132.

important here, and argues strongly for the exercise of this Court's authority to review the decision below. The Eighth Circuit has called a sharp halt to the search for a "limited right of access that is both practicable and desirable," held out as a continuing option and opportunity in CBS v. DNC. The decision renders any such right of access violative of the First Amendment.

Although some forms of regulation would involve the Commission and the courts in continuous, intrusive oversight of message content, impermissibly transforming government officials into editors, not all regulations designed to increase diversity and access need necessarily do so, as the court below apparently believed. For example, an increased channel capacity requirement, by itself, although foreclosed by the ruling below, would theoretically raise none of the dangers posed. 20/ Some forms of access,

---

20/ The Commission supported and enforced the All Channel Receiver Act of 1962 expressly in order to promote increased diversity and program choice through the growth of Ultra High Frequency television stations.

including the form chosen by the Commission's rules, do not present the danger of "the risk of an enlargement of government control of broadcast discussion of public issues" that has concerned the Court. See, e.g., CBS v. DNC, supra, 412 U.S. at 126. Just as government regulation of telephonic communications on a first-come, first-served basis has not involved the courts or the Commission in a continuing oversight of message content, increased capacity and first-come, first-served public access regulation would carry no danger of discrimination on the basis of subject content, Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972), or identity of speaker, First National Bank v. Bellotti, supra. 21/

21/ The Commission has been required, under the fairness doctrine, to judge broadly whether a licensee's overall performance indicates a sustained good faith effort to meet the public interest in being fully and fairly informed. CBS v. DNC, supra, 412 U.S. at 127. Access on a first-come, first-served basis could be implemented by the Commission's cable rules without even that minimal degree of oversight, which has been thought consistent with the First Amendment. Red Lion, supra.

In the field of electronic communication, where speakers depend on governmental assistance and licensing, the Court has not found the First Amendment a bar to the Commission's consideration of the fact that "the ... public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system ... heavily weighted in favor of the financially affluent or those with access to wealth." CBS v. DNC, supra, 415 U.S. at 94. But ignoring CBS v. DNC, the Eighth Circuit has forbidden the Commission to rely on that "public interest in providing access to the market place" of ideas even where, because of the technological characteristics of cable television, it is possible to give full rein both to the unfettered interests of cable operators, as cablecasters, to program whatever messages they choose, and to the national policy, derived from the First Amendment, of encouraging "'the widest possible dissemination of information from diverse and antagonistic sources.' Associated Press v. United States, 326 U.S. 1, 20, Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367 ...." Midwest Video I, supra, 406 U.S. at 668 n. 27.

CONCLUSION

The Court below held that the increased channel capacity and public access rules were beyond the Commission's jurisdiction and, if within that jurisdiction, violative of cable operators' First Amendment rights.

Although the jurisdictional holding of the Court below is erroneous, and should be reversed, the First Amendment holding particularly requires review. The majority simply assumed that cable operators were the First Amendment equivalent of newspaper publishers, without consideration of the characteristics of cable television that may justify differences in the First Amendment standards applied to it. Examination of those characteristics is necessary to decide whether the First Amendment bars the Commission's imposition of channel capacity and public access rules to achieve long-standing regulatory goals of increasing outlets for community self-expression, and augmenting the public's programming choice.

This case presents the question of where cable television fits into the First Amendment system of freedom of expression. The

Court should grant the writ of certiorari.

Respectfully submitted,

BRUCE J. ENNIS

JOEL M. GORA

CHARLES S. SIMS

American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

MICHAEL BOTEIN

Communications Media Center
57 Worth Street
New York, New York 10013

Attorneys for Petitioner